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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 615

CHARLES E. WILSON, AS SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CLARK F. REYNOLDS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense, the Secretary of the Navy,* and the members of the Civil Service Commission, petitioners, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on October 23, 1952.

OPINIONS BELOW

The oral opinion of the district court (Ra 37-38) is not officially reported. The opinion of the court of appeals (Rb 59-61) has not yet been reported.**

* By order of the district court dated February 16, 1953, the present Secretaries of Defense and of the Navy were substituted for their predecessors in office.

** Ra refers to Appendix for the Appellants; Rb refers to Appellees' Supplemental Appendix.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1952 (Rb 62). The time for filing a petition for a writ of certiorari was extended, by order of the Chief Justice dated January 19, 1953, from January 21, 1953, to February 20, 1953 (Rb 66). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 12 of the Veterans' Preference Act applies only to separations from the service and furloughs in excess of thirty days, or whether it overrides Section 14 of that Act and precludes demotions of veterans to promote the efficiency of the service.[1]

STATUTE INVOLVED

Section 12 of the Veterans' Preference Act of 1944, 58 Stat. 387, 390 (5 U.S.C. 861), reads in relevant part as follows:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * *. *Provided further,*

[1] This is the only question decided by the Court of Appeals. If certiorari is granted, the Government will also urge that Section 14 of the Veterans' Preference Act, authorizing demotions "for such cause as will promote the efficiency of the service", permits demotions based on a general employment policy of retaining the best qualified personnel in supervisory positions.

> That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *

Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390, as amended by the Act of August 4, 1947, 61 Stat. 723 (5 U.S.C., Supp. V, 863), reads in relevant part as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same per-

sonally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: * * *.

STATEMENT

Nine named civilian government employees at the Mare Island Naval Shipyard, with veterans' preferences and with efficiency ratings of "good" or better, brought a class suit in the District Court for the District of Columbia against the Secretary of Defense, the Secretary of the Navy, and the members of the Civil Service Commission, to challenge their demotions to promote the efficiency of the service—such demotions being in conjunction with a reduction in force in the shipyard—while non-veterans found to have higher qualifications

were retained in the positions and grades (Ra 2-26) from which the plaintiffs were demoted. Each plaintiff received a hearing by the Shipyard Commander who found him less qualified than those not demoted (Rb 38-39). Each plaintiff, except Madden, appealed to the Regional Director of the Civil Service Commission who rendered a lengthy opinion upholding the demotions (Rb 45-51) and thereafter to the Board of Appeals and Review of the Commission, which upheld the Regional Director (Rb 52-53). The District Court granted defendants' motion to dismiss. It agreed with the Civil Service Commission that Section 12 of the Veterans' Preference Act (*supra,* pp. 2-3) had not been violated since it was inapplicable to demotions, that Section 14 of that Act (*supra,* pp. 3-4) governed reduction in rank, and that the determination of the Secretary of the Navy that the demotions improved the efficiency of the service, being within his discretion, was not subject to judicial review (Ra 37-38). The Court of Appeals reversed, holding that regardless of relative qualifications and the desirability of a supervisory nucleus composed of the best craftsmen, when personnel is reduced the governing provision is Section 12 of the Veterans' Preference Act and the head of an agency is unable to select employees to be retained in the higher classification on the basis of individual merit (Rb 59-60).

REASONS FOR GRANTING THE WRIT

In a decision of great moment to all government agencies, and particularly the defense agencies, the Court of Appeals has held that in a reduction in

force, Section 12 of the Veterans' Preference Act prevents the head of an agency from selecting employees to be retained in a supervisory classification on the basis of individual merit, if the result will be the demotion of veterans with "good" efficiency ratings. When retrenchment is the order of the day, the Court of Appeals has subordinated Section 14 of that Act, specifically authorizing *demotion* for the good of the service, to Section 12, protecting veterans from *release* whenever they have efficiency ratings of "good" or better,[2] and has denied to the Government the employer's universal prerogative of assigning a high priority to the needs of its own service.

Experience had shown that in the Navy's shipyards a superior stand-by supervisory force is the key to the efficient utilization on short notice of large numbers of new workers. The Secretary of the Navy, in the belief that such a policy was compatible with the Veterans' Preference Act and in the interests of national defense, undertook, in the peace-time curtailment of employment in the Navy shipyards under his control, to retain a "supervisory nucleus" or cadre composed of the best qualified and most experienced supervisors, selected on the basis of individual merit, in order to meet emergencies that might require a sudden expansion in the working force. The general force of skilled and unskilled workmen was reduced by de-

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[2] The Court of Appeals thus would distinguish between downgradings resulting from a reduction in force and from a general reorganization plan not involving a reduction in force. *Hunter* v. *Mitchell*, 180 F. 2d 763 (C.A. D.C.); cf. *Fischer* v. *Haeberle*, 80 F. Supp. 652 (E.D. N.Y.).

termining those to be separated in accordance with the principle of veterans' preference prescribed by Section 12 of the Veterans' Preference Act. In contrast, after careful review of the supervisory staff, those who were deemed to be less qualified for the supervisory nucleus were demoted to journeymen positions in accordance with the requirements of Section 14 of the Act. Although the Secretary's action in that regard was approved in each instance by the Civil Service Commission, his policy has been invalidated by the Court of Appeals, which has admonished him for looking beyond the formal efficiency ratings to individual merit.

The problem is one of exceptional importance in the administration of the Veterans' Preference Act. Cf. *Mitchell* v. *Cohen,* 333 U. S. 411, 416; *Hilton* v. *Sullivan,* 334 U. S. 323, 327; *Elder* v. *Brannan,* 341 U. S. 277. The decision affects all civilian services of the Government, but the service agencies most acutely, because their ability to promote the national defense will, they believe, be drastically hobbled by the ruling below. If that is to be the result, it should follow only after a considered decision of this Court, especially since the matter is unlikely to arise in another circuit, the District of Columbia being the seat of the Government. Cf. *Blackmar* v. *Guerre,* 342 U. S. 512; *Money* v. *Wallin,* 186 F. 2d 411 (C.A. 3), certiorari denied, 341 U. S. 935.[3]

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[3] The instant case is the test case for six others pending in the District Court for the District of Columbia involving some sixty individuals.

1. Unlike Section 8(c) of the Selective Training and Service Act of 1940 which speaks of discharge from a position (see *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 286), Section 12 of the Veterans' Preference Act is given legitimate scope when applied to protect preference employees against *release* and furloughs in excess of thirty days, and then only in connection with a general reduction in personnel.[4] Cf. *Elder* v. *Brannan*, 341 U. S. 277; *Ashley* v. *Ross*, 191 F. 2d 655 (C.A. D.C.). The statutory implication is that in a reduction in force that would otherwise affect preference employees, they are not to be released but are to be *retained*, although not necessarily in the same positions. However, there is no occasion to expand the prescribed preference by holding, as the Court of Appeals does, that all demotions, except for misconduct or similar cause, made to improve the efficiency of the service, are subject to the reduction-in-force procedures even though no employee in the group has been involuntarily separated from the rolls or placed on furlough for more than thirty days. In that situation, a reduction in force is the

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[4] As Congressman Starnes explained his bill, H. R. 4115, 78th Cong., 2d Sess. (90 Cong. Rec. 3503):

> Section 12 provides for procedure in any reduction in personnel in any civilian service of any Federal agency, specific provisions appearing with respect to the preferred status of veterans in retention. * * *
>
> Section 14 gives special preferences to veterans in the way of prior notice before they are discharged, suspended for more than 30 days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as shall promote the efficiency of the service and for reasons given in writing. * * *

See also Sen. Rep. 907, 78th Cong., 2d Sess., p. 3; House Rep. 1289, 78th Cong., 2d Sess., p. 4.

condition, not the cause, of the demotion. It is one thing to protect veterans from a drastic step like wholesale severance from the payroll in the event of a reduction in force made to reduce personnel, presumably motivated by economy only and applied indiscriminately and without regard to the factor of individual merit (cf. *Ashley* v. *Ross, supra*), and another thing to keep them in their same positions without regard to maintaining or raising the efficiency of the service, merely because there happens to be a reduction in personnel at the installation affecting, not the veterans in question, but others.[5]

The demotions in question were grounded on Section 14 of the Veterans' Preference Act which, unlike Section 12, specifically refers to reductions in rank or compensation and in terms authorizes reductions for such cause as will promote the efficiency of the service (*supra,* pp. 3-4). Hence the Civil Service Commission holds (1949 Code of Federal Regulations, 1951 Supp., Title 5, §20.2(a)) that the provisions governing reduction in force do not apply to actions proposed for such reasons as will promote the efficiency of the service. Section 14 covers the demotion situation specifically, whereas Section 12 applies only to reductions in force. Respondents must, but cannot, prove that they come within Section 12, although they were not released but were retained, and that they do not come within Section 14 although they fall

[5] The extent to which Section 12 affects efficiency in the layoffs that it reaches is shown in Senate Report No. 1342, 82nd Cong., 2d Sess., *Utilization of Manpower in the Federal Government,* pp. 6-8.

within its terms and invoked its provisions. *Fass* v. *Gray*, 197 F. 2d 587, 592 (C.A. D.C.).

And nothing in the legislative history or administrative practice supports the construction that the term "efficiency of the service" in Section 14 is confined to individual misconduct and excludes matters of individual efficiency not reflecting fault or misconduct on the part of the employee. To the extent that it permits improvement of the efficiency of the service, Section 14 is not to be read narrowly but broadly for the protection of the public interest.

2. Far from recognizing that veterans' preference legislation is infused with the purpose of strengthening the national defense by means of a limited preference (*Keim* v. *United States*, 177 U. S. 290, 295), the Court of Appeals reads the Veterans' Preference Act as impairing the capacity of the heads of service agencies, through the exercise of their managerial discretion, to promote the national defense (cf. *Harris* v. *Runnels*, 12 How. 79, 86; *Reichelderfer* v. *Quinn*, 287 U. S. 315, 321). Of course, the responsibility for prescribing the extent of the preference for veterans rests with Congress, *Hilton* v. *Sullivan*, 334 U. S. 323, but that does not mean imputing to it the intention to grant an *absolute* preference, withdrawing from the heads of the agencies, in all conceivable circumstances, the right to consider efficiency of the service as a pertinent factor in connection with the demotion of veterans, at any time that there may be a reduction in force. The policy of the Secretary of

the Navy to consider comparative efficiency was reasonable and should have been upheld. The Veterans' Preference Act does not require an interpretation detrimental to the national defense and public welfare, and a fair reading discloses that it may be more reasonably interpreted, as the Secretary of the Navy did, to strengthen the national defense and the efficiency of the Government. It is not contended that the Secretary was actuated by an ulterior motive or had any purpose other than to promote the efficiency of the shipyards. The Court of Appeals accepts without reserve the soundness of the Secretary's judgments that respondents "were not qualified for the supervisory nucleus, composed of the best craftsmen, each one carefully selected on the basis of his individual qualifications" (Rb 59) and that the nonveterans were better qualified for supervisory positions than were respondents, but nevertheless excludes these factors as pertinent considerations. This goes far "beyond the protection contemplated by Congress" (see *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, 59) in a situation in which the public is much more than an indifferent bystander to a private seniority dispute and is definitely aligned in interest with the invalidated policy.

Apart from the great weight that should be accorded the administrative construction of the Secretary of the Navy and the Civil Service Commission (*United States* v. *Jackson,* 280 U.S. 183, 193; *Brewster* v. *Gage,* 280 U.S. 327, 336; *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315;

Billings v. *Truesdell*, 321 U.S. 542, 552-553), their construction promotes the paramount object of Congress [6] and, while affording ample scope to the preference for veterans, does not "single-mindedly" permit the preference to defeat the paramount Congressional object by tying the hands of the agency heads in dealing with a complex, ramified problem. Cf. *Southern SS Co.* v. *Labor Board*, 316 U.S. 31, 47; *Platt* v. *Union Pacific R.R. Co.*, 99 U. S. 48, 65.[7] Every presumption is in favor of an interpretation that authorizes the agency to concern itself with its own efficiency and that does not compel the Secretary to reconcile himself to inferior shipyards operated with relatively inferior personnel. Cf. *United States* v. *Lambert*, 123 F. 2d 395 (C.A. 3); *Sweetser* v. *Emerson*, 236 Fed. 161 (C.A. 1), certiorari dismissed, 243 U. S. 660; *Hall* v. *Union Light, Heat & Power Co.*, 53 F. Supp. 817, 819 (E.D. Ky.). Unless Congress clearly and unequivocally directs to the contrary, it should be assumed that the responsible administrative officials are not figureheads required to content themselves with inferior personnel in key positions when persons with superior qualifications are available. "These are matters peculiarly within the province

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[6] "Congress * * * has a primary obligation to bring about whatever production of war equipment and supplies shall be necessary to win a war. * * * Already the nation had some units of production of military supplies in the form of arsenals, navy yards, and in the increasing number of governmentally owned, if not operated, war material plants." *Lichter* v. *United States*, 334 U.S. 742, 765-766.

[7] It cannot be contended that the efficiency of the service is not promoted by keeping better qualified personnel in key positions or that the efficiency of the service would not have been furthered by the challenged demotions.

of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers." *Keim* v. *United States,* 177 U.S. 290, 296; cf. *Deviny* v. *Campbell,* 194 F. 2d 876, 880 (C.A.D.C.), certiorari denied, 344 U.S. 826; *Hilton* v. *Forrestal,* 165 F. 2d 251, 254 (C.A.D.C.), affirmed, 334 U.S. 323. An interpretation that prevents heads of agencies from interesting themselves in the needs of their services, and from refusing to be satisfied with less than the best, is suspect, because it puts the agency heads in the unfortunate position of being unable to fulfil the administrative or production responsibilities which have been imposed on them by Congress and the President.[8]

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[8] "* * * § 14 has reference to efficiency of the public service as a whole, rather than efficiency of performance by a single employee." *Kutcher* v. *Gray,* 199 F. 2d 783, 786 (C.A.D.C.).

There is no imputation of blameworthiness in suggesting that the needs of the service may demand unremitting efforts to raise the level of efficiency in shipyards having no employees with ratings lower than good. To rely on efficiency ratings as conclusive evidence of competency overlooks the fact that competency is a relative term that will vary with what is available and with the magnitude of the interests affected. When, during periods of expansion, "an employee of limited experience is promoted upon evidence of minimum administrative ability and a capacity for supervision over only a small segment of an operation" (Affidavit of Secretary of the Navy Sullivan, Rb 2), his "good" efficiency rating in a period of retrenchment will not represent his true fitness to hold down the higher job.

The Navy's policy on veterans' preference, far from being hostile to veterans, requires (Rb 3) that "Within the limitation of law and regulations and within the dictates of good management, every practical consideration be given to preference eligibles whenever an administrative action of a discretionary nature is to be taken." See also Navy Civilian Personnel Instructions 160, Section 6-3c.(5), Rb 32. The Navy

Moreover, any system of veterans' preference is in the last analysis really dependent on the efficiency of the service. Preference will not survive except in the medium of sound and healthy competitive ratings. For preference and efficiency to coexist, they must be accommodated on a basis that attaches some importance to relative efficiency. The capacity of naval shipyards to respond to emergency situations need not be sacrificed to an absolute preference for veterans predicated on nothing more solid than a doubtful inference from Section 12 of the Veterans' Preference Act.[9]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER J. CUMMINGS, JR.,
Solicitor General.

FEBRUARY, 1953.

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will not demote a veteran with clearly inferior qualifications unless it can also be shown beyond reasonable doubt that demotion of the veteran is necessary to promote the efficiency of the service.

It may be taken for granted, we suggest, that if the qualifications of the veterans were almost equal to those of the nonveterans and the disparity were slight, the administrative officials would not have acted as they did.

[9] Other shipyard demotion cases are *Wettre* v. *Hague*, 168 F. 2d 825 (C.A. 1); *Joy* v. *Hague*, 175 F. 2d 395 (C.A. 1); *Johnson* v. *Nelson*, 180 F. 2d 386 (C.A.D.C.), certiorari denied, 339 U.S. 957, rehearing denied, 339 U.S. 999; *Fischer* v. *Haeberle*, 80 F. Supp. 652 (E.D.N.Y.); *Breiner* v. *Wallin*, 79 F. Supp. 506 (E.D. Pa.).

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No. 615

Supreme Court of the United States

October Term, 1952

CHARLES E. WILSON, as Secretary of Defense, et al,
Petitioners,

v.

CLARK F. REYNOLDS, et al,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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In The

Supreme Court of the United States

October Term, 1952

No. 615

Charles E. Wilson, as Secretary of Defense, et al,
Petitioners,

v.

Clark F. Reynolds, et al,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Respondents file this brief in vigorous opposition to the granting of a Writ of Certiorari in this case. The Respondents admit that the statement of the petitioners in reference to the opinions of the Courts below, and the jurisdictional question are correct statements of the fact.

QUESTIONS PRESENTED

The petitioners have not correctly stated the questions to be presented, and have not included therein the statute of August 23, 1912, as amended February 16, 1916, Title 5 U.S.C. 648, and the Executive Orders of the President of the United States which were in full force and effect

on the date that each of the Respondents was reduced in rank, grade and salary, as well as the provisions of Title 12 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 861). The question is whether the Respondents, who are veteran preference eligibles and also permanent civil service employees with efficiency ratings of good or better, may, in the event of a reduction in force in the Mare Island Naval Shipyard, be reduced in rank, grade and salary while nonveterans who have no preference are retained in their positions in the said Naval Shipyard.

Respondents will show that the reduction of each of the Respondents in his respective rank, grade and salary was a plain, wilful and deliberate violation of law as found by the Court of Appeals below.

PERTINENT STATUTES AND EXECUTIVE ORDERS

"Sec. 851. Persons entitled to federal employment preferences.

"In certification for appointment, in appointment, in reinstatement, in re-employment, and in retention in civilian positions in all establishments, agencies, bureaus, adminstrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the Department of the

Army or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions. (June 27, 1944, ch. 287, Sec. 2, 58 Stat. 387, amended July 26, 1947, c. 343. Title II, Sec. 205(a), 61 Stat. 501.)"

5 U.S.C. 851.

"Sec. 861. Reduction in personnel; considerations affecting release. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations, which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings; Provided, That the length of time spent in active service of the armed forces of the United States of each such employee shall be credited in computing length of total service; Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions, for which they are qualified, before such agency, or

agencies, shall appoint additional employees from any other source for such positions. (June 27, 1944, ch. 287, Sec. 12, 58 Stat. 390.)"

5 U.S.C. 861.

"Sec. 863. Discharge, suspension, etc., only for cause; reason in wrting; advance notice; personal appearance; findings and recommendations. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay or reduction in rank or compensation is sought shall have at least thirty days' advance notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision; Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the

appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. (June 27, 1944, ch. 287, Sec. 14, 58 Stat. 390)."

5 U. S. C. 863

"Sec. 867. "All acts and parts of Acts inconsistent with the provisions hereof are modified to conform herewith, and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." (June 27, 1944, ch. 287, Sec. 18, 58 Stat. 390)."

5 U.S.C. 867.

Executive Order 3801:

"Executive Order 3801 amended Civil Service Rule XII by the addition of Paragraph 5. It read in part, as follows:

"5. In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good."

Executive Order 4240—June 4, 1925:

"Executive Order of March 3, 1923, will be construed to require that in selecting employees to be demoted or separated on account of any reduction of working forces honorably discharged soldiers, sailors and marines, and the widows of such, and the wives of injured soldiers, sailors, and marines, who themselves are not qualified for positions in the Government service, will be placed at the top of the lists of competing employees, in the order of their ratings, provided they attained for the last rating period an efficiency rating of not less than 80; and they will be retained in existing status, if their rec-

ord in respect to deportment, attitude, and attendance is satisfactory, in preference to all other persons with whom they are respectively in competition.

"Provisions of civil-service rule. Civil-service rule XII, Section 5 provides as follows: 'In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good, or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service.'"

"Reduction of force in excepted positions.—The President of the United States has informed the Commission that it is his desire that in making reductions in force the civil-service be applied by all agencies which are to be on a permanent basis. The provisions of Section 5 of Rule XII should therefore be applied regardless of the place of employment, and should also be applied in the regular branches of the Government in making reductions in force in *excepted* as well as *classified positions.*"

Act of August 15, 1876 (19 Stat. 143, 169), reads in part as follows:

"Provided, That in making any reduction of force in any of the Executive Departments, the head of such Department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval services of the United States, and the widows and orphans of deceased soldiers and sailors."

Act of August 23, 1912 (c. 350, sec. 4, 37 Stat. 413; 5 USC 648) provides among other things as follows:

". . . in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged, or dropped, or reduced in rank or salary" (Italics supplied.)

STATEMENT OF FACTS

Following the close of World War II reductions in force occurred in all of the Naval Shipyards in the United States. On January 1, 1945 there were 38,366 employees in the Mare Island Naval Shipyard. (46A.) In July, 1947, when the Respondents were reduced in rank, grade and salary, there were 10,419 employees. The Respondents were supervisors in the Mare Island Naval Shipyard. The reduction in supervisors took place because of the lack of employees to supervise. In making this reduction in force, the Respondents were reduced in rank, grade and salary while their positions were still being maintained in the said Naval Shipyard. Each of the Respondent's position was retained by a nonveteran despite the preference accorded to the Respondents in their employment. It was admitted that all persons retained in the Respondents' ranks and grades were nonveterans, and it was so stipulated in the record. (61A.) A large number of nonveteran supervisors were retained so that there remained in the said Naval Shipyard supervisory positions more than sufficient to retain the Respondents in their proper grades as well as to take care of some of the nonveterans, so the Respondents were not trying to force upon the United States their employment as supervisors but only to enforce their rights as preference employees in the supervisory positions.

The District Court held that the Respondents' rights were to be found in Section 14 of the Veterans Preference Act (5 U.S.C. 863) totally ignoring the rights of the Respondents under Section 12 of the Veterans Preference Act (5 U.S.C. 861) and other statutes as well as the Executive Orders of the President of the United States which will be hereinafter referred to.

PETITION FOR CERTIORARI SHOULD BE DENIED

No adequate or sufficient grounds exist for the granting of the writ of certiorari in this case. The decision of the United States Court of Appeals below in no way conflicts with the decision or opinion of any Courts of Appeal of the United States. Nor is there any justification for an application for the writ of certiorari in this case. No question of importance has been decided in any manner in conflict with the law applicable or in conflict with the decisions of this Court.

In fact, as will be pointed out hereafter, the decision of the United States Court of Appeals in this case is the only decision that could have been properly made in accordance with the statutes, and Executive Orders, and the decisions of this Court.

What the petitioners are asking this Court to do is judicially repeal the preference which Congress gave to the men and women who served in the Armed forces, and who are or were employed as civilians in the governmental service.

This Court in the case of *Hilton* v. *Sullivan, Secretary of the Navy,* 334 U.S. 323, decided every question which is raised here in the application for the writ of certiorari.

To properly present this case before this Court it might be well to go into the history of veterans preference as has been granted by Congress of the United States.

Employment preference to veterans has been granted by the United States government since the Act of March 3, 1865, Res. 29 (13 Stat. 571). The retention granted to veterans in governmental service by the Act of August 15, 1876, Chap. 287 Par. 3, 19 Stat. 143, 169, 5 U.S.C. 37, provided that in making any reduction in force of the Executive Departments the head of such department shall retain those persons who may be equally qualified who

have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors.

In 1909 the Attorney General of the United States, (27 Op. Atty. Gen. 490,) held that the preference accorded by the 1876 statute did not entitle such employees to preference over other persons when reductions in salary or rank are to be made even though their qualifications were equal. In the meantime the U. S. Court of Claims has held in the case of *Keim* v. *United States*, decided in 1898, 33 Ct. Cl. 174, that to entitled an ex-serviceman to retention in the service in preference to a civilian he must be equally qualified and such qualifications must be determined by the head of the department whose decision is not subject to review by the courts. This case was affirmed by the Supreme Court in the year 1900, 177 U. S. 290, 44 L. Ed. 774.

Congress of the United States, obviously angered by the interpretation placed on the 1876 statute by the Attorney General of the United States and also by the courts, enacted the statute of Aug. 23, 1912, Chap. 350, Par. 4, 37 Stat. 360, 413. This statute provided in part as follows:

> "In the event of reductions being made in the force of any of the Executive Departments, no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged, dropped, or reduced in rank or salary."

This statute was in absolute command that in the event of a reduction in force in the departments of the government no honorably discharged soldier or sailor should be reduced in rank, grade or salary, and was to cover the defects in the 1876 statute. The Court will note that the statute of 1912, above referred to, relates only to the Executive Departments of the government. But Executive Order 3567 of October 24, 1921 recognized the statute as giving veterans an absolute preference and it was ex-

tended to the field service by Executive Order 3801 on March 3, 1923 and also to positions not under civil service, Dept. Circ. 146 U.S. Civil Serv. Comm. Oct. 22, 1936. This has already been judicially determined by this Court, *Hilton* v. *Sullivan,* 334 U. S. 336-337. Executive Orders 3567 and 3801 referred to have never been rescinded. Executive Order 4240 of June 4, 1925, as amended by Executive Order 5068, provided an absolute retention preference for veterans over nonveterans where the efficiency ratings were good. All of this was also determined by this Court, *Hilton* v. *Sullivan, supra.*

On June 27, 1944 Congress passed the Veterans Preference Act. The purpose of this Act was to codify all existing laws relating to the preference of veterans in government employment and not to subtract from them any of the rights or preferences which have been heretofore granted them. Sections 18 of the Act Title 5 U.S.C. 867 provided that the Act should not be construed to take away from any veteran preference eligible any rights heretofore granted to or possessed by him under any existing law, Executive Order, civil-service rule or regulation, of any department of the government or officer thereof. Therefore all rights which the Respondents had under any Executive Orders of the President of the United States were not repealed by the passage of the Act of June 27, 1944. In the hearings before the Committee on Civil Service, United States Senate, Senator Starnes stated the purpose of the Bill as follows:

> "H.R. 4115 is the result of years of work by the major veterans' organizations of the country and the Civil Service Commission and the author of the bill. * * * It is the desire of the veterans' organizations that the existing Executive orders and adminstrative orders giving veterans preference should be adopted by the Congress of the United States as a national policy and thus give them the sanctity of legislative approval. * * * What it does is to give legislative

> sanction to existing veterans' preference, to the rules and regulations of the executive branch of the Government, and to broaden and strengthen those preferences * * *. There are some new provisions contained in this bill. I just want to say briefly that this bill takes away no existing veterans' preferences either by statute or Executive order, but it does strengthen, broaden, and implements the veterans' preference policy heretofore in effect." (Hearings, Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess. on S. 1762 and H.R. 4115, page 8)

The Respondents therefore rely upon the Executive Orders and Section 12 of the Veterans Preference Act, Title 5 U.S.C. 861 which reads as follows:

> "Reduction in personnel; considerations affecting release. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations, which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings; Provided, That the length of time spent in active service of the armed forces of the United States of each such employee shall be credited in computing length of total service; Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: And Provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions, for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

The second proviso of this statute states that preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all competing employees.

The meaning of this proviso was fully explained by Civil Service Commissioner Flemming, Senate Hearings (Civil Service Committee on S. 1762, 8 H. R. 4115, Hearings 78th Cong.—2d Sess. at page 12). Commissioner Flemming said that the proviso in Section 12 relative to retention was the same as the 1912 statute. The exact language that he used is as follows:

> "That proviso is substantially the same as the law passed by Congress in 1912, which was interpreted to apply to only the departmental service. By Executive Order of March 3, 1923, the provisions of the law of 1912 were likewise extended to the Federal service, so that the last proviso simply continues what has been in practice throughout the entire Federal service since 1923."

In the brief for the Respondents in *Hilton* v. *Sullivan, supra*, No. 560 October Term, 1947, the then Solicitor General of the United States, Philip P. Perlman, stated at page 35 as follows:

> "The second proviso to Section 12 of the Act is an explicit command, that in the event of a reduction in force there must be given to veterans with an efficiency rating of 'good' or better, an absolute retention preference over competing non-veterans irrespective of length of service."

This foregoing statement cannot be reconciled with the statements contained in the petition now filed in this cause for certiorari, nor can any of the other statements made as to the absolute preference accorded veterans in the brief of the then Solicitor General filed in the *Hilton* v. *Sullivan* case, and the Respondents hope that the court in deciding whether the petition for certiorari should be granted will refer to the brief filed by the Solicitor General in the *Hilton* v. *Sullivan* case, *supra*. The views of the Solicitor Generals in these cases cannot be reconciled.

The petitioners attempt to rely on Section 14 of the Veterans Preference Act, Title 5 U.S.C. 863. This section

is patterned after Title 5 U.S.C. 652 relating to removals from classified service only for cause, and the language therein contained is very similar to the provisions of Title 5 U.S.C. 652, and Section 14 has been construed by the U. S. Court of Appeals for the District of Columbia to apply only to removals for cause, see *Ashley* v. *Ross*, 191 F. 2d 655. It has nothing to do whatever with reduction in force such as the facts in this case involve. The Respondents were not reduced in rank for any cause whatever. The case is purely and simply one of a reduction in force falling squarely within Section 12 of the Veterans Preference Act.

The decision of District Judge Holtzoff (37A.) was "off the cuff" after listening to a few minutes of argument by counsel on each side. At that time, Judge Holtzoff was in the motions court, and no consideration was given to the briefs filed on behalf of the Respondents. However, the attention of Judge Holtzoff was invited to the fact that his ruling overruled the opinions of both District Judges Pine and Morris in cases of similar nature. In the case of *Johnson* v. *Nelson*, 180 F. 2d 386, in the District Court Judge Morris sustained a motion for summary judgment in behalf of the plaintiff where the facts are identical with the facts in the instant case. Judgment was reversed only upon the ground that the plaintiff Nelson had not exhausted his administrative right of appeal before the Civil Service Commission.

In the case of *Sullivan et al* v. *Sullivan, Secretary of the Navy*, Civil Action 1012-49 filed in the United States District Court for the District of Columbia, Judge Pine issued an injunction restraining the Secretary of the Navy from demoting the plaintiffs in that case in their supervisory positions in the Boston Naval Shipyard. Both of these decisions were made prior to Judge Holtzoff's "shot gun" decision in this case. The Court was therefore fully aware of the decisions of his associate

Judges, but refused to follow them. The case of *Sullivan* v. *Sullivan, supra,* was dismissed because the plaintiffs in that case had likewise not exhausted their administrative remedies, but solely upon that ground. Those suits were instituted because the U. S. Court of Appeals for the 1st Circuit had held in *Wettre* v. *Hague,* 168 F. 2d 825, that the Executive Orders and statutes were so plainly violated that it was not even necessary to exhaust the administrative remedies. In the *Wettre* v. *Hague* case, suit was brought by supervisors in the Boston Naval Shipyard to restore them to their proper positions. That case is squarely in point with the facts and the law applicable in the instant case.

Comments on the Cases Cited in Support of the Petition for Certiorari.

The case of *Ashley* v. *Ross,* 191 F. 2d 655 relates to a reduction of the force in the U. S. Mint at Philadelphia, Penna., and the only question involved in that case was whether Section 14 of the Veterans Preference Act applied so a 30 days notice was necessary. The Court held that it was a reduction in force and no notice was required under Section 12, which applied to reductions in force.

The case of *Breiner* v. *Wallin,* 79 F. Supp. 506 is likewise not in point. In that case the Court for the Eastern District of Pennsylvania dismissed the action solely upon the ground that the Court was without jurisdiction to issue an order in the nature of a mandamus to compel the reinstatement of employees. In plain words, the Court held it did not have jurisdiction of the cause of action.

The case of *Devinv* v. *Campbell,* 194 F. 2d 876, certiorari denied, 344 U.S. 826 related to charges against the plaintiff by the Superintendent of the Government Printing Office. This case definitely arose under Section 14 of the Act.

The case of *Elder* v. *Brannan,* 341 U.S. 277 is likewise not in point. In that case, the question of preferential right of reemployment of a veteran preference attorney in the Department of Agriculture was involved.

The case of *Hunter* v. *Mitchell,* 180 F. 2d 763, involved a reduction in force in the Philadelphia Naval Shipyard and that case was reversed by the Court of Appeals after judgment had been entered for the defendants upon the ground that a question of fact was involved as to whether there was a reduction in force in the particular division of the Yard in which the plaintiff was employed.

The case of *Johnson* v. *Nelson,* 180 F. 2d 386, was a case where the U. S. Court of Appeals held that Nelson should have exhausted his administrative remedies before filing a suit. This case has already been commented on.

The case of *Joy* v. *Hague,* 175 F. 2d 395, was a case in which the U. S. Court of Appeals for the 1st Circuit dismissed the action upon the ground that there was a lack of jurisdiction.

The case of *Keim* v. *United States,* 177 U.S. 290, was a decision made under the 1876 Preference Act and prior to the amendment of the statute in 1912. It has no application to this case.

The case of *Mitchell* v. *Cohen,* 333 U.S. 411, involved only the question of whether a naval reservist was entitled to veterans preference. This case is likewise not in point.

The case of *Money* v. *Wallin,* 186 F. 2nd 411, involved the question of whether the Secretary of the Navy was an indispensable party defendant, and the U. S. Court of Appeals for the 3rd Circuit so held. That case is likewise not in point.

None of the other cases cited in the petition for certiorari support the stand taken by the petitioners. There

is not one single case other than the ruling of Judge Holtzoff in this case that supports their contention that these Respondents were rightfully reduced in their grades.

All of the Questions Raised by the Petitioners Were Decided by This Court in Hilton v. Sullivan.

Hilton, the petitioner in *Hilton* v. *Sullivan*, 334 U.S. 323, was a nonveteran government employee with a high efficiency rating furloughed without pay because of curtailment of work in the Charleston Naval Shipyard in South Carolina. The petitioner in that cause challenged the regulations of the Civil Service Commission. The action of Hilton was to compel the Secretary of the Navy to retain him and to discharge or demote veterans with lesser retention credits. This Court held, that where a permanent civil-service employee who had veterans preference and who had an efficiency rating of 'good' or better, was entitled to be retained in his position over and above the right of a nonveteran even though such nonveteran had higher retention credits. This Court said in 334 U.S. at 338 as follows:

> "The Senate Civil Service Committee was told by the congressional sponsor of the measure that "this bill takes away no existing veterans' preference, either by statute or Executive order, but it does strengthen, broaden and implement the veterans' preference policy heretofore in effect," and that it would "give legislative sanction to existing veterans' preference, to the rules and regulations in the executive branch of the Government . . . ." A member of the Civil Service Commission in explaining the bill to the Senate Committee called the proviso here involved the "heart of the section," and stated that it was "substantially the same" as the 1912 Act, which, as before pointed out, provided for an absolute veterans' retention preference without regard to length of service. And in explaining the Bill on the floor of the House, the sponsor and active proponents of the

measure explained it as strengthening and broadening veterans' preferences then embodied in statutes and executive orders.

Not only did the friends of the Veterans Preference Act explain to the Senate Committee on Civil Service and to the Congress the broad preferences the Act would grant. Hostile witnesses graphically pointed out to the Senate Committee what they deemed would be the unfairness of the Act's effect if passes as written. One such witness representing the Civil Service Reform League said: "I think you ought to give consideration to . . . **retention of veterans in** civil service regardless of length of service. I do not think it is fair, a veteran be retained in service who has been in the service 6 months as against a person who has been in the service 25 years. I believe some distinction might be made, otherwise you would do a grave injustice to those people who have long years of service in civil service." And another witness against the Bill pointed out that under it non-veterans would "be the first to be laid off and the last to be taken on."

Thus Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy."

In view of the foregoing opinion of this Court there can be little doubt that the preference that the Respondents had was to be retained in their respective positions, so long as such positions exist, and their efficiency ratings were good or better.

An attempt is made by the Petitioners to show that the only retention that the Respondents had was to a position. Thus under the theory of the Petitioners a supervisor could be reduced to a mechanic, then to a mechanic's helper, and finally to a laborer at the instance of administrative officials, and finally he could be dis-

charged upon the sole finding of the administrative official that the employee retained was a better workman. To thus interpret the Act would be placing veterans preference in the hands of administrative officials for determination, and would utterly destroy the preference granted to any veteran in governmental employment.

The competing employees mentioned in Section 12 were the employees in the same rank and grade as the Respondents. They were competing with supervisors, and by no stretch of the imagination could a supervisor be competing with a mechanic's helper or a common laborer as Petitioners argue.

Congress set the standard for a veteran preference eligible to be retained in his position. It is the duty of this Court to construe the law having in mind the intent and purpose of Congress in enacting the legislation.

VETERANS PREFERENCE RIGHTS DO NOT DESTROY THE EFFICIENCY IN THE NAVAL SHIPYARDS

The Respondents in this case are all skilled craftsmen employed in the Mare Island Naval Shipyard. They lose every right as veteran preference eligibles if their efficiency ratings fall below satisfactory. At the time of these reductions in grade, the efficiency ratings were fair, good, very good and excellent. All of the Respondents had efficiency ratings of 'good' or better, and in the cases associated with this case, a great many of them had 'excellent' efficiency ratings. An order to reduce the Respondents, and others in like situations, issued by the Secretary of the Navy was not to promote the efficiency of the service but to simply give to the Master Mechanics the right to select whom they would retain in supervisory jobs. Every one of the Respondents, and those in like cases, were qualified and experienced craftsmen. They

were as much career employees as the men who were retained in their particular positions. The reductions in grade of each of the Respondents, and those in similar cases, did not promote the efficency of the service. The order of the Secretary of the Navy was carried out by the Master Mechanics on a personal preference and not on the efficiency of the employee. Veterans of long years service were reduced in grade and nonveterans were retained.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit is based upon the only proper construction of the law applicable to the facts in this case. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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